

Civil Division - New Castle County

January 12, 2005

Mr. John A. DeGhetto  
President  
Newark Lodge #4  
Fraternal Order of Police  
P.O. Box 475  
Newark, DE 19715

**Re: Freedom of Information Complaint**  
**Against City of Newark**

Dear Mr. DeGhetto:

On October 8, 2004, our office received your Freedom of Information Act ("FOIA") complaint alleging that the City of Newark (the "City") violated FOIA by not providing minutes of an executive session held on August 9, 2004. By letter dated October 13, 2004, we asked the City to respond to your complaint. We received the City's response on October 29, 2004. We received a supplemental response from the City on November 17, 2004, including a copy of the executive session minutes that we reviewed *in camera*.

On August 9, 2004, at the close of its regularly scheduled meeting, the Mayor and Council of the City went into executive session for the purpose of discussing personnel

related issues. Notice of the August 9, 2004 meeting, including notice of a “[r]equest for Executive Session re Personnel” was timely and properly published. Specifically, the executive session was called in order for Council to evaluate the performances of the City Secretary and the City Solicitor to determine whether the City Secretary should be given a raise and whether the City Solicitor and Deputy Solicitor should have their hourly rates for legal services increased. After the discussion concerning the performance of these individuals, Council ended the executive session and reconvened the public meeting. At that time, with no further public discussion, Council voted unanimously to increase the annual salary of the City Secretary and to increase the hourly rate paid to the City Solicitor and the Deputy Solicitor.

On September 2, 2004 you wrote to the City Secretary requesting a copy of the minutes of the executive session held on August 9, 2004. By letter dated September 20, 2004, the City Secretary denied your request based upon the recommendation of the City Solicitor.

#### Relevant Statutes

FOIA requires that “[a]ll public records shall be open to inspection and copying by a citizen of the State during regular business hours by the custodian of the records for the appropriate public body.” 29 *Del.C.* §10002(a). FOIA further requires that “[e]very meeting of all public bodies shall be open to the public except those closed” for executive session for one of nine purposes authorized by statute. *Id.* §10004(a). One exception is to discuss “[p]ersonnel matters in which the names, competency and abilities of

individual employees . . . are discussed, unless the employee . . . requests that such a meeting be open.” *Id.* §10004(b)(9). Additionally, FOIA exempts from the definition of “public record” any “record of discussions held in executive session pursuant to subsection (b) and (c) of Section 10004 of this title.” 29 *Del.C.* §10002(d)(10). Section 10004(f), however, provides that this exemption applies only “so long as public disclosure would defeat the lawful purpose for the executive session, but no longer.”

#### Legal Analysis

In your complaint you have acknowledged that personnel records, the disclosure of which would constitute an invasion of personal privacy, are not deemed public records under FOIA. See 29 *Del.C.* §10002(g)(1). Likewise, you do not dispute that a public body may call for an executive session in order to discuss personnel matters pursuant to 29 *Del.C.* §10004(b)(9). Still, you seek the minutes of the executive session involving discussions related to the City Secretary and the City Solicitor and Deputy Solicitor “after information relating to specific job performance/qualifications of the employees in the noted positions is redacted by the City.”

As the City noted in its response to the complaint “[t]he Solicitor and Deputy Solicitor are not salaried Newark employees, but serve as contracted professionals.” The City further acknowledges that “[d]uring the executive session in this case, the competency, qualifications, strengths and weaknesses of the City Secretary and City Solicitor were discussed.” It then argues that “[t]he fact that the Secretary is a salaried public employee and that the Solicitor performs legal work for a public body does not suggest that either individual has lost his or her right to privacy when candidly evaluated

by the public employer.” The City concludes that the minutes taken during the executive session evaluations of the City Secretary and the City Solicitor are not public records under FOIA and should not be disclosed because to do so would infringe on these individuals’ personal privacy.

As the City has acknowledged, the City Solicitor and the Deputy Solicitor are not public employees. Rather, they are independent contractors hired by the City to provide professional legal services. This office has previously held that the “personnel” exception to the open meeting provisions of FOIA does not apply to independent contractors but only public employees. See Att’y Gen. Op. 02-IB17 (August 6, 2002). Similarly, we find that since the City Solicitor and Deputy Solicitor are not employees of the City, any records relating to their provision of legal services are not exempt from disclosure under the “personnel file” exemption of FOIA. Therefore, the City erred when it went into executive session to discuss its contractual arrangements with the City Solicitor and Deputy Solicitor. For this reason, the portions of the minutes of Council’s executive session pertaining to those discussions must be provided.

With respect to the discussions relating to the salary of the City Secretary, we find that the City properly called an executive session pursuant to 29 *Del.C.* §10004(b)(9) and that the minutes of the executive session relating to those discussions are not public records pursuant to 29 *Del.C.* §10002(g)(1). While a public body must try to redact exempt information from its records to make non-exempt information available to the public, we have reviewed the minutes of the executive session *in camera* and find that the discussions pertaining to the City Secretary are not subject to redaction since the minutes

Mr. John A. DeGhetto

Page 5

January 12, 2005

relate to the City Secretary relating entirely to her performance, abilities and compensation. As such, their release would constitute an invasion of her personal privacy thereby defeating the lawful purpose for which the executive session was called. See 29 *Del.C.* §10004(f)

Conclusion

For the foregoing reasons, we find that the City did not violate the executive session or public records requirements of FOIA as they apply to the City Secretary. We further find that with respect to the discussions relating to the City Solicitor, Deputy Solicitor and Council improperly held an execution session for a purpose not authorized by statute. Therefore, we instruct the City to redact from the minutes of the Council's executive session all discussions pertaining to the City Secretary and to provide you with a copy of the redacted minutes.

Very truly yours,

Keith R. Brady  
Assistant State Solicitor

APPROVED:

---

Malcolm S. Cobin  
State Solicitor

Cc: The Honorable M. Jane Brady  
Phillip G. Johnson, Opinion Coordinator